STATE OF MICHIGAN

COURT OF APPEALS

HILL & REEVES, INC.,

Plaintiff-Counterdefendant-Appellant,

v

ALAN YOUNG & ASSOCIATES, P.C.

Defendant-Appellee,

and

ALAN YOUNG and LARAY GRAYSON,

Defendants-Counterplaintiffs-Appellees,

and

DAVID HILL and PHILLIS HILL,

Third-Party Defendants.

UNPUBLISHED
April 14, 2005

No. 253746
Wayne Circuit Court
LC No. 03-300714-NM

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion to dismiss for violation of a court order relative to discovery. We affirm.

Plaintiff is a corporation under which Dr. Hill and Dr. Reeves practice dentistry. Defendant Alan Young & Associates, PC, is a certified public accounting firm. Defendant Young is the firm's president and defendant Grayson is an employee of the firm. Plaintiff filed suit against defendants alleging accountant malpractice, breach of contract, and promissory estoppel. The core controversy in this appeal concerns defendants' attempts to take the depositions of Hill and Reeves, which plaintiff's attorney prohibited. At the onset, defendants

twice noticed the depositions of both doctors, but they were rescheduled by agreement of the parties. A third notice set November 17, 2003, as the date for the depositions, at which time Hill, Reeves, and plaintiff's counsel appeared. According to defendants, when asked who was designated as plaintiff's corporate representative, counsel responded that Hill was the representative. Hill's deposition was scheduled first, and plaintiff's counsel told defense counsel that Reeves would also be attending Hill's deposition. Defense counsel objected and indicated that the doctors had been noticed individually. Defense counsel stated that because Hill was the designated corporate representative, he was entitled to attend Reeves' deposition, but that Reeves could not attend Hill's deposition. After consulting the court rules, plaintiff's attorney refused to allow the depositions to take place unless the doctors were present at each other's deposition. All parties left without any deposition having been taken.

On December 11, 2003, defendants filed a motion to dismiss because of the alleged discovery violation. A hearing on the matter was held on December 19, 2003. The trial court ordered that the depositions be completed by January 9, 2004, and that they be conducted without Hill being present at Reeves' deposition and without Reeves being present at Hill's deposition. The court stated, "The corporate representative at this deposition, the other doctor cannot be present in the room, their depositions should be taken separately." The trial court further stated that it would grant the motion to dismiss if the depositions were not completed by January 9. Attempting to clarify the court's ruling, plaintiff's counsel asked:

> *Q.* Are you saying that the depositions of both individuals have to take place and they cannot attend as the corporate representative, have just one person deposed?
>
> *A.* That's correct. You got one corporate representative and that's who you indicated, Dr. Hill right?

Plaintiff's counsel responded that both doctors were corporate representatives, to which the court stated:

> [Counsel] I'm not going to argue with you, you're not going to convince me of that. Maybe I'm not making myself clear, I don't buy your argument that they are both the corporate representatives for purposes of this lawsuit. Dr. Hill is the . . . representative based upon representations that you made at the time of the deposition. Get the depositions done [counsel], I don't need anymore colloquy with you. You know what's going to happen if the depositions are not done.

The court reiterated, "I mean it, I will dismiss the case." Plaintiff's attorney then requested that the court hold an evidentiary hearing to determine if both doctors were in fact corporate representatives. The court responded:

> [Counsel] why do you always want to take it all the way to another level that it doesn't really have to go to, you do that all the time.

> Look, I've made a decision, you don't have to bring your clients in. You want them to take more time from their practice to come in here to tell me something that you're going to prep them on so that they will know how to answer whatever question you ask relative to who is the corporate representative and they're going to say both of us are, that is totally irrelevant to me. What you raised was that you thought the only way the witness could be excluded is if there is a court order. [Defense counsel] has a court order excluding the two of them from each other's depositions, that is it.
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> The depositions had better be done by January 9 of 2004.

On January 2, 2004, the court entered an order that provided in part:

> IT IS FURTHER ORDERED that Plaintiff shall submit David Hill and Jeffrey Reeves for deposition on or before January 9, 2004, and said depositions to be taken separately, neither witness to be allowed to be present during the other witness's deposition; provided, however, that *if said depositions are not completed by January 9, 2004, the Court will grant Defendants' Motion to Dismiss.* [Emphasis added.]

Subsequently, defense counsel noticed Hill and Reeves for depositions on December 29, 2003. Plaintiff's counsel responded that, because she was the corporation's counsel and per the court's order neither doctor could serve as plaintiff's designated representative, she would not accept service of the notice on behalf of the doctors. In response to counsel's refusal to accept service, defendants asserted that plaintiff's attorney misunderstood her obligations to accept service pursuant to MCR 2.305(A)(1). Defendants again noticed plaintiff's counsel for the taking of the depositions on January 2, 2004. In response, plaintiff's counsel sent defendants a fax, which stated in part, "Obviously, I have not practiced law as long as you have and do not know nearly as much as you do. Please provide the court rule or case law that says I must accept service of process on behalf of witnesses." The doctors did not appear for their scheduled depositions.

On January 8, 2004, defendants filed a renewed motion to dismiss because the doctors had not been presented for deposition. A hearing was held the following day regarding motions for reconsideration, judicial disqualification, and to compel document production, which plaintiff had filed following the court's ruling on defendants' initial motion to dismiss. Defendants' renewed motion to dismiss was not scheduled to be heard until the following week, but the parties did not object to it being heard that day because dismissal would render plaintiff's motions moot, and the court allowed arguments to be presented regarding the request for dismissal. Defendants stated that they had diligently, but unsuccessfully, attempted to secure the doctors' depositions. Plaintiff's attorney responded that, because she was counsel for plaintiff and not for the doctors individually, she had no obligation to accept service of the deposition notices, given that the court ordered that neither doctor could serve as a corporate representative. Without discussion, the court granted defendants' renewed motion to dismiss.

We find it unnecessary to determine the correctness of the trial court's order with respect to whether Hill and Reeves could be present for each other's deposition, nor is it necessary to determine the soundness of the court's denial of plaintiff's request for an evidentiary hearing in regard to whether Hill and Reeves were both corporate representatives. The bottom line is that the trial court issued a discovery order that could not be any more clear, i.e., Hill and Reeves were to be deposed by January 9, 2004, and were to be deposed outside each other's presence. Counsel did not have the option or liberty to decide not to comply with the order predicated on her belief that the court was mistaken in its ruling. Plaintiff did not appeal the court's order. An order is an order and absent appellate relief, counsel was required to abide by the court order. We find counsel's assertion that the subsequent deposition notices were not properly served to be an affront to the court's ruling and nothing more than an obstinate and purposeful attempt to circumvent the court's decision. Counsel's position is clearly contrary to the law. MCR 2.305(A)(1) provides in part:

> Service on a party or party's attorney of notice of the taking of the deposition of a party, or of a director, trustee, officer, or employee of a corporate party, is sufficient to require appearance of the deponent; a subpoena need not be issued.

For purposes of service under the rule, there is no legitimate dispute that the doctors are officers of plaintiff, a corporate party. Therefore, defendants' notice of deposition served on plaintiff's counsel was sufficient to require Hill and Reeves to appear for their depositions.

Regarding the sanction of dismissal, this Court in *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), stated:

> The Michigan Court Rules at MCR 2.313(B)(2)(c) explicitly authorize a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery. The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it. [Citations omitted.]

This Court reviews a trial court's imposition of discovery sanctions for an abuse of discretion. *Bass, supra* at 26. The *Bass* panel listed various factors that should be considered when determining an appropriate sanction. *Id.* at 26-27. We note that MCR 2.313(B) does not

recite that factors or options must be considered or considered on the record before a sanction is imposed.[1] While we acknowledge that the case law speaks of a court evaluating factors and options on the record, we find that, under the particular circumstances presented, the court's failure to expressly do so here does not require a reversal and remand for such articulation and evaluation, where the court specifically and repeatedly warned plaintiff's counsel, through its ruling from the bench and the accompanying order, that the case would be dismissed if there was a lack of future compliance. The case was dismissed following the second motion for dismissal.

In *Bass*, the trial court dismissed the action, without reference or resort to the various factors and alternative punishments, after a lack of compliance with multiple discovery orders that had been entered in regard to numerous motions for dismissal. The trial court had warned the plaintiff that it would grant the motion to dismiss if noncompliance continued, and indeed dismissal was subsequently entered following the plaintiff's failure to abide by the discovery orders. *Bass, supra* at 27-33. This Court affirmed, ruling, "In light of plaintiff's repeated discovery failures, we find no abuse of discretion . . . . *Id.* at 35. The Court did not "accept plaintiff's suggestion that the trial court could not resort to the severe sanction of dismissal without first having imposed a 'trail of lesser sanctions.'" *Id.*

In *Mink v Masters*, 204 Mich App 242, 245; 514 NW2d 235 (1994), this Court found that the trial court did not abuse its discretion in granting a default judgment as a sanction for failure to comply with discovery. The *Mink* panel noted that "the court had specifically warned defendants in its second order that a failure to comply with the discovery request would result in the entry of a default judgment." *Id.*

Here, at the hearing on defendants' initial motion to dismiss, the trial court chided plaintiff's counsel for her courtroom behavior and placed her on notice that the case would be dismissed for failure to comply with the court's ruling. Multiple warnings of dismissal emanated from the bench during the hearing. Further, the order regarding the motion directly warned plaintiff that "if said depositions are not completed by January 9, 2004, the Court will grant

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[1] MCR 2.313(B) provides in pertinent part:

> (2) If a party . . . fails to obey an order to provide or permit discovery . . ., the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
>
> * * *
>
> (c) an order . . . dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party[.]

Defendants' Motion to Dismiss." The depositions were not completed as counsel for plaintiff flagrantly, willfully, and wantonly refused to facilitate discovery as twice requested by defendants and as ordered by the trial court; there was nothing accidental or involuntary. The reason given for failing to engage in the required discovery was baseless. Considering that the standard of review is an abuse of discretion, we cannot conclude that the trial court's order dismissing the action was "so palpably and grossly violative of fact and logic that it evidence[d] perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Stephen L. Borrello